

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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|---------------------------------------|---|----------------------------|
| In the Matter of |) | |
| |) | |
| NORTHEAST COMMUNICATIONS |) | File No. BNPFT-20030829AUC |
| CORPORATION |) | |
| |) | |
| Application for a Construction Permit |) | |
| For a New FM Translator Station at |) | |
| Manchester, New Hampshire |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2005

Released: August 18, 2005

By the Deputy Associate General Counsel, Administrative Law Division:

1. This order denies a Complaint and Request for Sanctions, filed June 17, 2005, by Saga Communications of New England LLC (Saga),¹ which alleges that Northeast Communications Corporation (Northeast) violated the Commission's ex parte rules.² Saga alleges that Northeast solicited an improper ex parte presentation by a United States Senator regarding this restricted proceeding.

Background

2. On March 8, 2005, the Commission's Media Bureau granted Saga's application for a construction permit for a new FM translator station at Manchester, New Hampshire to operate on the same frequency as Northeast's FM station WFTN(FM), Franklin, New Hampshire.³ On April 6, 2005, Northeast, which had earlier petitioned to deny Saga's application, filed a petition for reconsideration of the grant and a motion for stay.

¹ Northeast filed an opposition on June 28, 2005, which argues that because Northeast specifically advised the Senator to serve Saga, it did not violate the ex parte rules. Saga filed a reply to opposition on July 8, 2005, which distinguished a case cited by Northeast and argued that Northeast misread another case.

² 47 C.F.R. §§ 1.1200-16.

³ See Public Notice, Report No. 45939 (Mar. 11, 2005) at 20.

3. On April 6, 2005, the same day that Northeast filed its petition for reconsideration, Northeast's president, Jeff Fisher, wrote to New Hampshire Senator Judd Gregg objecting to the grant to Saga and stating: "We would appreciate your looking into this matter and requesting the FCC to expeditiously act on our motion to stay and appeal [i.e., petition for reconsideration]."⁴ The letter also states:

Since this is a contested matter, any contact you have with the FCC must also be provided to Saga Communications of New England, LLC. Their address is: 73 Kercheval Avenue, Gross Pointe Farms, Michigan 48236.⁵

4. On April 22, 2005, Senator Gregg forwarded Fisher's correspondence to the Commission and indicated that: "I would appreciate your review of Mr. Fisher's letter and any information you might provide regarding the status of this issue which I may share with my constituent."⁶ The Senator's letter gave no indication that it was served on Saga, as required by 47 C.F.R. § 1.1208, which prohibits *ex parte* presentations in restricted proceedings such as application proceedings.

5. Saga contends that Northeast violated the *ex parte* rules by unfairly attempting to use political pressure to persuade the Commission to take action against Saga's application. Saga notes that in past cases the Commission has found violations of the *ex parte* rules where a party has solicited an *ex parte* presentation by a member of Congress, and, where such violations were intentional, has imposed sanctions. Saga asks the Commission to dismiss Northeast's petition for reconsideration and to assess a forfeiture against Northeast.⁷

Discussion

6. Northeast did not violate the rule against soliciting an improper *ex parte* presentation. The Commission's *ex parte* rules provide: "No person shall solicit or encourage others to make any improper presentation under the provisions of this section." 47 C.F.R. § 1.1210. The Senator's letter, which Northeast solicited, constituted a prohibited *ex parte* presentation in a restricted proceeding under 47 C.F.R. § 1.1208 because it was not served on Saga.⁸ However, Fisher's April 6, 2005 letter to the Senator demonstrates that, although Fisher did not explicitly cite the *ex parte* rules, he did not intend for the Senator to make an improper *ex parte* presentation. The letter informs the Senator that "any contact you have with the FCC must also be provided to Saga." Northeast, unlike the parties in the cases cited by Saga⁹, requested that the Senator serve

⁴ Letter from Jeff Fisher to The Honorable Judd Gregg (Apr. 6, 2005) at 1.

⁵ Id. at 2.

⁶ Letter from Judd Gregg, U.S. Senator to Ms. Diane Atkinson, Federal Communications Commission (Apr. 22, 2005).

⁷ Complaint and Request for Sanctions at 2-4.

⁸ See Letter from Joel Kaufman, Deputy Associate General Counsel to the Honorable Judd Gregg (finding Senator's letter to be in violation of the *ex parte* rules).

⁹ Elkhart Telephone Co., 11 FCC Rcd 1165 (1995) (sanctioning party for providing Senator with unsigned draft letter to FCC Chairman that addressed the merits); Michael L. Glaser, Esq., 4 FCC Rcd 4557 (Man.

the other party. It did not solicit an unlawful *ex parte* contact in violation of section 1.1210 even though an improper congressional *ex parte* occurred.¹⁰

7. Nor was Northeast's failure to specifically cite the *ex parte* rules in its letter to the Senator a violation given that it requested that he serve Saga. The Commission has stated:

[I]t would . . . be preferable for parties communicating with their representatives about pending restricted proceedings to specifically inform them of the restricted *ex parte* status of the proceeding and the prohibition on *ex parte* presentations, thereby avoiding even inadvertently instigating an inappropriate solicitation. We strongly advise that in the future, parties follow this practice.¹¹

This is effectively what Northeast did when it asked the Senator to provide Saga with a copy of his communications with the FCC.

8. Moreover, contrary to Saga's suggestion in its reply to opposition, permissible requests for congressional assistance are not limited to status inquiries. Saga draws too much from the statement in Elkhart that "Elkhart is not prohibited from soliciting assistance from members of Congress with respect to the status of a particular proceeding."¹² The whole sentence reads: "While Elkhart is not prohibited from soliciting assistance from members of Congress with respect to the status of a particular proceeding before the Commission, particularly where administrative delay is concerned, *or from seeking substantive intervention from members of Congress in accordance with the ex parte rules*, it may not ask members of Congress to make an *ex parte* presentation to the Commission that Elkhart itself is prohibited from making." [Emphasis added.]¹³ Saga wholly ignores the clause that recognizes that a party may ask members of Congress to intervene substantively in accordance with the *ex parte* rules.

9. Finally, we reject Saga's argument that: "Although Northeast included a note to the Senator pointing out that this is a 'contested matter,' it was Northeast's responsibility to comply with the *ex parte* rules; not the Senator's."¹⁴ Because Northeast requested the Senator to serve Saga, it did not violate section 1.1210, and because Northeast did not itself make a presentation to the Commission, it did not violate section

Dir. 1989) (No forfeiture imposed for soliciting Senator to intervene in restricted proceeding where party may not have understood proceeding was restricted).

¹⁰ See Mobile Communications Holding, Inc., 14 FCC Rcd 18515, 18522-23 ¶ 25 (1999) (" . . . MCHI did not intend that the presentations be made on an *ex parte* basis, and, thus did not 'solicit' an improper *ex parte* presentation" in circumstances where it served three of four presentations and apparently intended to serve the fourth). Portland Cellular Partnership, 11 FCC Rcd 19997, 20011 ¶ 37 (1996), aff'd sub nom. Saco River Cellular, Inc. v. FCC, 133 F.3d 25 (D.C. Cir. 1998), cert. denied, 525 U.S. 813 (1998) (letter asking for meeting with Senator regarding FCC decision did not solicit Senator's referral of letter to FCC).

¹¹ Id. at 20011 ¶ 38.

¹² Reply to Opposition at 4.

¹³ Elkhart Telephone Co., supra note 9 at 1166 ¶ 8.

¹⁴ Complaint and Request for Sanctions at 3.

1.1208.¹⁵ In the absence of any violation of the ex parte rules by Northeast there is no basis to impose a sanction against it.

10. ACCORDINGLY, IT IS ORDERED, Pursuant to the authority delegated under 47 C.F.R. § 0.251(g), that the Complaint and Request for Sanctions, filed June 17, 2005, by Saga Communications of New England, LLC, IS DENIED.

Joel Kaufman
Deputy Associate General Counsel
Administrative Law Division

¹⁵ See Portland Cellular Partnership, *supra* note 10 at 20011 ¶ 36 (1996) (Party was not required, after the fact, to serve senator's ex parte presentation that party did not solicit).